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In The

Supreme Court of the United States

October Term, 1994

JACK KEVORKIAN, *Petitioner,*

v.

STATE OF MICHIGAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED

I.

MAY THE GOVERNMENT FORCE A COMPETENT ADULT WHO IS AFFLICTED WITH IRREMEDIABLE, INTOLERABLE PHYSICAL PAIN OR SUFFERING TO CONTINUE TO SUFFER, AGAINST HIS OR HER WILL, UNDER CIRCUMSTANCES WHEREIN ALL REASONABLE ALTERNATIVES ARE EXHAUSTED AND THE ONLY REASONABLY AVAILABLE MEANS OF ENDING THAT SUFFERING INVOLVES THE PERSON'S KNOWING AND VOLUNTARY ENDING OF HIS OR HER OWN LIFE?

II.

DOES A COMPETENT ADULT POSSESS A CONSTITUTIONALLY PROTECTED RIGHT TO ASSISTANCE IN ENDING IRREMEDIABLE, INTOLERABLE PAIN OR SUFFERING UNDER CIRCUMSTANCES WHEREIN THE END OF SUCH PAIN OR SUFFERING INVOLVES THE ENDING OF ONE'S LIFE AND WHEN NO OTHER REASONABLE ALTERNATIVES ARE AVAILABLE?

III.

DOES THE HOLDING OF THE MICHIGAN SUPREME COURT THAT A PERSON WHO ASSISTS IN A SUICIDE MAY BE LIABLE AS A FELON, WHERE THERE IS NO STATUTE PROSCRIBING THE SAME AND WHERE THERE HAS NEVER BEEN ANY DECISIONAL LAW SO HOLDING, CONSTITUTE A DEPRIVATION OF DUE PROCESS OF LAW, DENIAL OF NOTICE AND A PROHIBITION OF THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION OF THE UNITED STATES?

IV.

IS THE STATUTE WHICH THE MICHIGAN SUPREME COURT HELD WAS APPLICABLE TO ASSISTED SUICIDE IN THE ABSENCE OF OTHER STATUTORY AUTHORITY, M.C.L. 750.505; M.S.A. 28.773 UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ:

I. CERTIORARI SHOULD BE GRANTED TO ANSWER THE CRITICAL QUESTION OF OUR TIME: DOES A COMPETENT ADULT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO END INTOLERABLE PAIN OR SUFFERING, EVEN THOUGH THE END OF SUCH PAIN OR SUFFERING MAY INVOLVE THE ENDING OF ONE'S LIFE, AND TO OBTAIN ASSISTANCE IN SO DOING? 7

II. THE DECISION OF THE MICHIGAN SUPREME COURT IS ERRONEOUS. 19

III. THE PROSECUTION TO WHICH THE MICHIGAN SUPREME COURT SUBJECTS THE PETITIONER VIOLATES THE *EX POST FACTO* AND DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION. 20

IV. THE QUESTION HEREIN IS IMPORTANT. 21

Conclusion 23

APPENDICES (*SEPARATELY BOUND*):

OPINION
of the Michigan Supreme Court . . . . . Volume I, A-1

OPINION
of the Michigan Court of Appeals . . . Volume II, A-111

Page

OPINION
of the Wayne County Circuit Court (Kaufman, J.) —
assisted suicide . . . . . Volume II, A-145

OPINION
of the Oakland County Circuit Court (Cooper, J.) —
assisted suicide . . . . . Volume II, A-163

OPINION
of the Oakland County Circuit Court (Breck, J.) —
open murder . . . . . Volume II, A-204

TABLE OF AUTHORITIES

CASES:

Compassion in Dying v. *Washington*, 850 F.Supp. 1454 (W.D. Wash., 1994) 14, 15

Cruzan v. *Director, Missouri Dep't. of Health*, 497 U.S. 261; 110 S. Ct. 2841; 111 L.Ed.2d 224 (1990) 8, 13, 14, 17

Daniels v. *Williams*, 474 U.S. 327; 106 S. Ct. 662; 88 L.Ed.2d 662 (1986) 12

Griswold v. *Connecticut*, 381 U.S. 479; 85 S. Ct. 1678; 14 L.Ed.2d 510 (1965) 11

Hobbins v. *Attorney General*, 205 Mich.App. 194; 518 N.W.2d 487 (1994) 1, 6

People v. *Campbell*, 124 Mich.App. 333; 335 N.W.2d 27 (1983) 20

People v. *Roberts*, 211 Mich. 187; 178 N.W. 690 (1920) 20

Planned Parenthood of Southeastern Pennsylvania v. *Casey*, ___ U.S. ___; 112 S. Ct. 2791; 120 L.Ed.2d 674 (1992) 9, 12, 13, 14, 16, 17

Page

Poe v. *Ullman*, 367 U.S. 497; 81 S. Ct. 1752; 6 L.Ed.2d 989 (1961) 11, 13

Whitney v. *California*, 274 U.S. 357; 47 S. Ct. 641; 71 L.Ed.2d 1095 (1927) 12

STATUTES:

28 U.S.C. § 1257(a) 1

M.C.L. 700.496; M.S.A. 27.5496 8

M.C.L. 750.318; M.S.A. 28.550 5

M.C.L. 750.505; M.S.A. 28.773 ..... 5, 7, 20, 21

M.C.L. 752.1027; M.S.A. 28.547(127) 5, 6, 15

Revised Code of Washington, 9A.060(1) 15

CONSTITUTIONAL AUTHORITY:

U.S. Constitution, Amend. I 2, 11

U.S. Constitution, Amend. V 2, 11

U.S. Constitution, Amend. VIII 22

U.S. Constitution, Amend. IX 2, 8, 9, 11, 12

U.S. Constitution, Amend. XIV 2, 9, 11, 12, 15, 16, 17

MISCELLANEOUS AUTHORITY:

Hamilton, Alexander, *The Federalist*, No. 84 ..... 10, 11

No. _____

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court [App. A] appears at 1994 WL700448 (Mich). The Opinions of the Michigan Court of Appeals appears at 205 Mich.App. 180; 517 N.W.2d 293 (1994) and 205 Mich.App. 194; 518 N.W.2d 487 (1994), sub nom *Hobbins v. Attorney General* [App. B]. The opinions of the respective circuit courts are not published.

JURISDICTION

The Opinion of the Michigan Supreme Court was entered on December 13, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) in that the highest court of Michigan found a state statute valid in the face of a challenge that said statute was repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved here include Article I, § 9, the First, Fifth, Ninth and Fourteenth Amendments and prohibitions against laws which are vague and overbroad.

STATEMENT OF THE CASE

Petitioner, Jack Kevorkian, M.D., is a graduate of the University of Michigan School of Medicine. He has become known, throughout the United States and the rest of the world, as one of the leading exponents on the rights of competent adults to end intolerable and irremediable pain and suffering. Receiving hundreds of requests for assistance every year, Dr. Kevorkian has limited his practice to those who have explored all other reasonable courses and who have not gained relief. In connection with the cases herein, he was consulted by five persons who were in continuous, intractable pain and suffering, to wit: Sherry Miller, Marjorie Wantz, Donald O'Keefe, Merian Frederick and Ali Khalili, M.D.

Sherry Miller was suffering from multiple sclerosis. A bright, vivacious athlete, she was ravaged by the cruelties of her disease and was reduced to wheel-chair confinement, totally dependent upon others for her physical maintenance. She could not perform normal bodily excretory functions without assistance; she was unable to engage in other daily functions of life without assistance. She would surely die a slow, agonizing and humiliating death. She had requested the services of Dr. Kevorkian to end her life for a period of two years prior to October, 1991. He refused to assist for that time but instead counselled her to obtain further medical treat-

ment. During those two years, her physical condition deteriorated progressively and dramatically to the point where she had extraordinary difficulty in speaking and breathing. She suffered considerable pain and discomfort. Her very existence was one of unremitting, excruciating torture and agony.

Marjorie Wantz was suffering from unremitting vulvar pain known as vulvadynia. She had visited clinics throughout the United States and had been the subject of ten (10) separate surgeries designed to alleviate her pain, to no avail. Due to the intensity and insidiousness of the pain which afflicted her, she was unable to sleep for more than two or three hours at a time and invariably cried herself to sleep. She had been given morphine pain patches to the limit beyond which her life would be endangered. These patches did not provide her with pain relief such as to allow her to live a tolerable life. Mrs. Wantz had requested Dr. Kevorkian's assistance for several years prior to October, 1991.

In October, 1991, after Mrs. Wantz and Mrs. Miller provided Dr. Kevorkian with medical records and other documentation attesting to their afflictions, and after it was assured that both Mrs. Wantz and Mrs. Miller had given informed consent and their families consented, Dr. Kevorkian agreed to be present at the termination of their lives. Mrs. Miller activated a carbon monoxide canister and breathed in carbon monoxide, ending her own life. Mrs. Wantz activated a machine designed by Dr. Kevorkian, causing lethal substances to flow into her veins, ending her own life.

Donald O'Keefe was suffering from multiple myeloma, a rare form of bone cancer. He could not swallow food and was nourished through intravenous feeding. He was unable to leave his bed. He was attached to a machine which provided a continuous morphine drip for pain, all

to no avail. His digestive system, including his esophagus, stomach and intestines had begun to rot. He had the pallor of a concentration camp victim. He was in enormous pain and was terminal. He consulted with Dr. Kevorkian in order to end his suffering.

Merian Frederick was suffering from Amyotrophic Lateral Sclerosis ["ALS"], commonly known as Lou Gehrig's Disease, an affliction involving progressive degeneration of the musculature and motor neurons. Victims of this disease usually die within three (3) years of onset and most choke to death in their own sputum. The disease is quite painful and disables the victim. There is no cure or treatment for this disease. Mrs. Frederick consulted with Dr. Kevorkian to terminate the unspeakable suffering to which she was consigned by ending her life in 1993.

Ali Khalili, M.D., was a world-renowned physician specializing in rehabilitative medicine and pain management and who practiced and taught at Northwestern University School of Medicine. He was afflicted with incurable bone cancer. While, undoubtedly, Dr. Khalili could have ended his own life and could have acquired whatever drugs or other substances would be necessary, he chose to seek Dr. Kevorkian's counsel. Dr. Khalili was in enormous pain and suffered greatly before coming to Michigan to see Dr. Kevorkian.

Thus, each of the five patients was suffering from a frightful disease which completely and utterly destroyed his or her ability to lead a normal life, free of constant physical torture and misery. Each one of these patients was actively punished with afflictions so horrendous as to preclude any semblance of the enjoyment of daily life.

These patients sought the assistance of Dr. Kevorkian after having attempted all other reasonable methods of

alleviating the pain and torture of their pathetic existence. In each case, Dr. Kevorkian engaged in counselling and insured that the patient was (a) competent; (b) fully informed as to the ramifications of the termination of life; (c) assured that termination of life was not desired by Dr. Kevorkian and that Dr. Kevorkian did not advocate that the patient engage in suicide; (d) not subject to coercion or duress in making the decision; (e) making the decision of his or her own free will, voluntarily and based upon a full explanation of the situation involved; (f) definite and not tenuous with respect to the decision to end suffering through the termination of life; and (g) given a full opportunity and advised to consult with family members, clergy, and other persons from whom the patient may have wished to seek advice and counsel.

Marjorie Wantz and Sherry Miller ended their own lives on October 23, 1991. Donald O'Keefe ended his life on September 9, 1993. Merian Frederick ended her life on October 22, 1993. Dr. Ali Khalili ended his life on November 22, 1993.

PROCEEDINGS BELOW

Petitioner, Dr. Jack Kevorkian, was charged with criminal conduct in connection with the suicides of the aforementioned five individuals. In Wayne County Circuit Court, he was charged with assisting a suicide in violation of Michigan Compiled Laws ["M.C.L."] 752.1027; Michigan Statutes Annotated ["M.S.A."] 28.547(127) in connection with the death of Donald O'Keefe. In Oakland County Circuit Court, he was charged with open murder under M.C.L. 750.318; M.S.A. 28.550 and also a catch-all felony under M.C.L. 750.505; M.S.A. 28.773 in the suicides of Marjorie Wantz and Sherry Miller; and with

assisting in the suicides of Merian Frederick and Dr. Ali Khalili in violation of M.C.L. 752.1027; M.S.A. 28.547(127). In each case, the persons who committed suicide were stricken with intolerable pain or suffering with no viable hope of recovery. In each case, the charges against Dr. Kevorkian were dismissed.

In the O'Keefe case, the Wayne County Circuit Court, Richard C. Kaufman, J., found that the assisted suicide statute violated the United States Constitution by impermissibly burdening the due process interest in the decision to end one's life. In the Frederick and Khalili cases, the Oakland County Circuit Court, Jessica R. Cooper, J., concluded that a person has the right to commit suicide and found that the assisted suicide statute was unconstitutional under the Michigan Constitution. In the Wantz and Miller cases, the Oakland County Circuit Court, David F. Breck, J., concluded that assisting a suicide was not a crime.

In the O'Keefe case, the Michigan Court of Appeals affirmed the dismissal of the assisted suicide charges on state constitutional grounds, but found that the United States Constitution did not confer a right to commit suicide and that citizens have no right to control their own destinies absent permission by the State. The State appealed, and Dr. Kevorkian cross-appealed.

In the Frederick and Khalili cases, the Michigan Court of Appeals affirmed the dismissal, finding the assisted suicide statute infirm on state constitutional grounds, and the State appealed. In the open murder cases, the Michigan Court of Appeals reinstated the charges and the Petitioner appealed.

The Michigan Supreme Court then heard the appeals in a consolidated appeal with another case, *Hobbins* v. *Attorney General*, not involving Petitioner, and reversed

the decisions of the Michigan Court of Appeals, ruling that the Michigan assisted suicide statute was constitutional under both the Michigan and United States Constitutions. The Michigan Supreme Court also held, in the Wantz and Miller cases, that assisting a suicide might constitute murder under Michigan statutes and ordered an evidentiary hearing to be held in connection therewith. It also held that while those suicides occurred before the enactment of Michigan's assisted suicide statute [the statute became effective February 25, 1993 and expired on November 25, 1994] the Petitioner could properly be charged under M.C.L. 750.505; M.S.A. 28.773, which provides as follows:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $ 10,000.00, or both at the discretion of the court."

The five cases were remanded back to the trial courts for trial and/or other proceedings.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ANSWER THE CRITICAL QUESTION OF OUR TIME: DOES A COMPETENT ADULT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO END INTOLERABLE PAIN OR SUFFERING, EVEN THOUGH THE END OF SUCH PAIN OR SUFFERING MAY INVOLVE THE ENDING OF ONE'S LIFE, AND TO OBTAIN ASSISTANCE IN SO DOING?

As advances in science and medicine out-pace the evolution of society, courts are faced with the dilemma

of fixing a balance between individual liberty and the State's exercise of its police powers. In performing this juggling act, courts often have been asked to make decisions that will ultimately result in both the end of suffering for a patient and the concomitant end of life. See *Cruzan* v. *Director, Missouri Dep't. of Health*, 497 U.S. 261; 110 S.Ct. 2841; 111 L.Ed.2d 224 (1990).

Courts have ordered the discontinuance of life-sustaining medical treatment — an order that inevitably leads to the death of the patient. In reaching such difficult decisions, the court must determine the wishes of the suffering patient, who is not always capable of expressing those wishes. The patient-advocate law represents one way in which the Michigan legislature has attempted to address the difficult issues created by modern medical technology. M.C.L. 700.496; M.S.A. 27.5496.

When does the individual's interest in freedom from unjustifiable State interference in personal decision-making outweigh the State's interest in protecting the public health, morals, safety and general welfare? Some would argue that the State has never had the authority to limit or define the liberty interests of the people. Government only has the power which has been delegated by the people and we have never abdicated our right to self-determination. U.S. Const. Amend. IX. Others argue that we only enjoy those freedoms which have been specifically enumerated in the Bill of Rights. Such an argument ignores the very principles upon which the government of this nation was established, would render nugatory the Ninth Amendment to the Constitution of the United States, and would turn on its head the fundamental principle that government is supposed to serve the people, not the other way around.

Following the reasoning of this Court over the past few decades, the State may not intrude into certain personal decisions regarding family, parenthood and bodily integrity. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, ___ U.S. ___; 112 S. Ct. 2791; 120 L.Ed.2d 674 (1992). Such reasoning is based on the premise that government cannot govern that which it lacks the power to govern. Although the State arguably has an interest in protecting life, and thus, preventing irrational suicide, that interest does not encompass an interest in prolonging suffering or inevitable death.

The right of a competent adult to end intolerable pain, suffering, or debilitation is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment and by the Ninth Amendment. The ancient liberty interests in self-realization and self-determination were recognized by the framers of the Constitution. This Court's decisions have not created new rights. This Court's decisions merely have pulled in the reins on a government gone wild; on a government bent on governing where it has no authority to govern; on a government intent upon inculcating personal religious beliefs into the law of the land.

This Court should follow the "essential holdings" of its recent cases that have espoused a right to be free from unwarranted, State-imposed limitations on the exercise of personal liberty, and find that the State of Michigan cannot unreasonably infringe upon a competent adult's decision to end interminable personal physical suffering through the ending of life.

Indeed, the State arguably has a legitimate interest in protecting life under certain circumstances. For example, the State health code, homicide laws, and regulation of the medical professions are designed to pro-

tect life. Does the State's interest in protecting life, though, extend so far as to include an interest in prolonging suffering? Does the State have a legitimate interest in forcing its citizens to endure agonizing pain, suffering and debilitation in the name of protecting life?

In No. 84 of *The Federalist*, Alexander Hamilton assured the people that the authority vested in the new government did not create a sovereign to which the people would become subservient, with the abdication of all rights save for those specifically reserved by a Bill of Rights. Hamilton and the other founders of this nation subscribed to the philosophy that men and women, in their natural state, were free beings. The framers subscribed to the notion of the inalienable rights of self-realization and self-determination. The Bill of Rights is not a license, it is not an expression of privilege. The Bill of Rights and subsequent amendments to the Constitution are an expression of a check on the power of government.

The State has advanced the argument that only those rights specifically enumerated in the constitution are afforded constitutional protection. Hamilton recognized the danger of this argument when he wrote concerning the freedom of the press:

> "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, **to men disposed to usurp, a plausible pretense for claiming that power**. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given,

> and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was vested in the national government." [Emphasis supplied.]

The Federalist, No. 84.

Over the past few decades, this Court and the other courts of this nation have addressed issues of personal autonomy under the precepts of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The right to self-determination has been said to be found within the zone of privacy inherent in the First and Ninth Amendments, and within the substantive due process and equal protection guarantees of the Fifth and Fourteenth Amendments.

The First Amendment has a penumbra wherein privacy is protected from governmental intrusion. *Griswold* v. *Connecticut*, 381 U.S. 479, 483; 85 S. Ct. 1678; 14 L.Ed.2d 510 (1965). This zone of privacy emanates from the specific guarantees of the Bill of Rights. *Poe* v. *Ullman*, 367 U.S. 497; 516-522; 81 S. Ct. 1752; 6 L.Ed.2d 989 (1961). The courts have addressed many controversies over the penumbral rights of "privacy and repose." *Griswold*, *supra* at 485. Ultimately, the right to be free from governmental intrusion upon one's own body is secured by the privacy right which emanates from the liberty provisions of the First, Fifth, Ninth and Fourteenth Amendments.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, in plain English, the Founding Fathers consigned to the rubble heap the notion that a right must be specifically enumerated in the Constitution in order for the people to possess it. The right to end suf-

fering need not be specifically guaranteed by the Constitution, for it may be found within the penumbra of privacy recognized and protected by the Ninth Amendment.

This Court has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. *Griswold*, *supra* at 486, n 1. The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has been understood for well-over a century to contain a substantive component as well as a procedural one. The Due Process Clause also bars "certain government action regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U.S. 327, 331; 106 S. Ct. 662; 88 L.Ed.2d 662 (1986).

All fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney* v. *California*, 274 U.S. 357, 373; 47 S. Ct. 641; 71 L.Ed. 1095 (1927). "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, *supra*, 112 S. Ct. at 2805. As was recognized by Justice Harlan over thirty years ago:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a **rational continuum** which, broadly

> speaking. includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a **reasonable and sensitive judgment** must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." (Emphasis supplied.)

Poe, supra, 367 U.S. at 543 [Harlan, J., dissenting.]

Dr. Kevorkian asserts that, absent a compelling state interest, government is without power to abridge an individual's right to self-determination. The individual's liberty interest in self-determination cannot be made subject to the whims of "men disposed to usurp" the power retained by the people. The State would urge this court to legitimize the usurpation of power by men claiming that only God can determine the time of death (except, of course, in death penalty cases in states permitting the same), that the people never have possessed the right to self-determination and that those professing such a right are guilty of blasphemy.

"It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, . . . **as well as bodily integrity**." [Emphasis supplied.] *Casey, supra*, 112 S.Ct. at 2806.

In dealing with the issues of the cessation of life-sustaining medical treatment, this Court has addressed whether a state may require proof, by clear and convincing evidence, of an individual's wishes regarding the withdrawal of such treatment. *Cruzan, supra*. In addressing the question, this Court acknowledged that "[a] competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment." *Id.* at 2843.

A competent individual has a liberty interest in refusing unwanted medical treatment, including treat-

ment that often means the difference between life and death. A person can discontinue life-sustaining treatment, an act that inevitably ends in death. In order to discontinue the treatment, a doctor or other health care professional must disconnect the apparatus that is supplying the treatment. The act of disconnecting the life-sustaining treatment is no different from the act of connecting a life-ending apparatus. To attempt to distinguish between withdrawing life-support thereby suffocating or starving an unconscious patient to death, and not providing similar means to a conscious suffering patient, is absurd. See *Cruzan*, *supra*, 497 U.S. at 292-301; 110 S. Ct. at 2859-2863 [Scalia, J., concurring.] In fact, for thirteen years, Michigan Right-to-Life held up passage of the Patient Advocacy/Living Will bill in Michigan by falsely claiming that withdrawing life-support was murder. If abortion is a fundamental right (and it arguably involves a third party), *Casey*, *supra*; if withdrawing life support to surely cause death is a fundamental right, *Cruzan*, *supra*; then controlling one's own life certainly must be fundamental. To find otherwise would be irreconcilable with this Court's decisions in *Casey* and *Cruzan*.

If an individual may designate a third party to order discontinuation of life-sustaining treatment when the individual is no longer capable of expressing the desire to refuse treatment, why cannot a competent person request assistance in ending the suffering and pain of his or her affliction? Why does the State's interest in protecting life extend to one act and not to the other?

The constitutional issues raised in this Petition have been addressed by the United States District Court for the Western District of Washington. *Compassion in Dying* v. *Washington*, 850 F.Supp. 1454 (W.D. Wash., 1994). The federal district court, following the reasoning

espoused by this court in *Casey*, found that the right to end one's suffering during a terminal illness is embodied in the liberty interests protected by the Fourteenth Amendment.

The United States District Court for the Western District of Washington, in early May, 1994, ruled unconstitutional a state statute imposing criminal sanctions for physician-assisted suicide. 850 F.Supp. at 1467. The plaintiffs in that case asserted that the Fourteenth Amendment to the United States Constitution guarantees adults who are mentally competent, terminally ill, and acting under no undue influence, the right to voluntarily hasten their death by taking a lethal dose of physician-prescribed drugs. 850 F.Supp. at 1456.

Neither Michigan nor Washington has a law prohibiting suicide or attempted suicide. Nonetheless, both states banned aiding or causing the suicide of another. Revised Code of Washington, 9A.060(1); M.C.L. 752.1027; M.S.A. 28.547(127). The Washington plaintiffs challenged the constitutionality of the statute in that it placed an undue burden on their right to commit suicide, and on equal protection grounds.

The Federal District Court, following a long line of United States Supreme Court cases, recognized that certain personal decisions are constitutionally protected. 850 F.Supp. at 1459. Finding the reasoning in *Casey* highly instructive and almost prescriptive, the Court concluded that the decision of a terminally ill person to end his or her life "involv[es] the most intimate and personal choices a person may make in a lifetime" and constitutes a "choice[] central to personal dignity and autonomy." The District Court quoted the decision of this Court in *Casey*:

> "These matters, involving the most intimate and personal choices a person may make in a life-

> time, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.**" [Emphasis supplied.]

850 F.Supp. at 1459, quoting *Casey*, *supra*, 112 S. Ct. at 2807.

The District Court also followed *Casey's* acknowledgement of the deep, heart-felt differences of opinion about the morality of abortion, and its recognition that the court's duty is not to impose a particular moral standard:

> "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter . . . ."

850 F.Supp. at 1460

The District Court held that "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman. Thus, consistent with the reasoning in *Casey*, such an intimate personal decision falls within the realm of the liberties constitutionally protected under the Fourteenth Amendment." 850 F.Supp. at 1460.

In addressing the defendants' arguments that *Casey* is inapposite because of the significant differences between reproductive rights and assisted suicide, the District Court stated that the abortion situation raises *more* difficult questions about competing interests. In reproductive rights cases, there is not only the interest of the pregnant woman seeking an abortion, but also the potential life interest which cannot speak for itself.

As Dr. Kevorkian argued below, only one life is involved in the case of an assisted suicide involving a competent person, and that individual can voice his or her wishes. The District Court was not persuaded by the defendants' absurd arguments regarding the differences between abortion and suicide. The Court was not persuaded by the defendants' "undue influence" argument either, and noted the many situations in which a pregnant girl or woman would be subjected to intense pressure to get an abortion. 850 F.Supp. at 1461.

The District Court also found this Court's decision in *Cruzan* to be instructive. In *Cruzan*, this Court had to decide whether a competent person has a constitutionally protected liberty interest in refusing unwanted, life-sustaining medical treatment including artificially delivered nourishment essential to life. In the majority opinion written by Chief Justice Rehnquist, this Court acknowledged that the logic of its prior decisions embraced just such a liberty interest. This Court held that the United States Constitution grants a competent person the right to refuse life-sustaining medical treatment. *Cruzan*, *supra* at 497 U.S. at 278-279.

The District Court phrased the question, the same question that faces this court, as follows: "[I]s there a difference for purposes of finding a Fourteenth Amendment liberty interest between refusal of unwanted treatment which will result in death and committing

physician-assisted suicide in the final stage of life?" 850 F.Supp. at 1461. The Court held that there is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the District Court did not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.

The District Court's decision is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

In Oregon, on November 8, 1994, the citizens of that State, recognizing the need for compassion and flexibility in situations involving terminal illnesses, approved a provision which specifically permitted medical assistance in ending life under specified guidelines. The effective date of that law has been stayed pending litigation which may eventually find its way to this Court.

Thousands of individuals in this country are suffering unspeakable physical torture and torment as a result of disease. Not all of them have the ability to obtain relief from that torture and torment. Some diseases are not susceptible to relief, given the present state of medical science. Not all of the persons consigned to such torture and torment wish to suffer the totality of the slings and arrows of misfortune which the diseases will visit upon them. Not everyone so afflicted voluntarily chooses to experience the worst of the cruelties by which the diseases ravage their physical beings.

In certain cases, the only realistic means of alleviating the pain and suffering is termination of life. If the choice is between ending the pain and suffering through

termination of life on the one hand, and continuing horrendous suffering on the other, some competent adults will choose to continue the suffering; other competent adults freely, knowingly and voluntarily will choose not to suffer. Not everyone so afflicted has the ability to end the suffering by themselves. The question is whether government should or may impose itself on these people to force them to suffer against their will.

II.

THE DECISION OF THE MICHIGAN SUPREME COURT IS ERRONEOUS.

The Michigan Supreme Court simply failed to take into account the essential federal constitutional liberty interest which is central to the individual's self-determination of the amount of pain and suffering which he or she is willing to endure. The Michigan Supreme Court looked at the issue from the point of whether one has the right to commit suicide without focusing on the core factor herein.

It is not the ending of life, but rather the ending of suffering, which is the genuine issue. Persons who are afflicted with intolerable suffering wish only to end the suffering. It is not termination of life for the sake of death which is sought; rather, it is the termination of suffering, if need be through the termination of life, which is the real point. It is this which the Michigan Supreme Court failed to recognize.

As a result, the Michigan Supreme Court failed to address the critical issue as to what right government has to force competent, adult individuals to suffer against their will. By misconstruing the issue as one involving the right to suicide as opposed to the right to be free from state-compelled suffering, the Michigan Supreme Court failed to recognize how this Court's deci-

sion in *Casey* set forth principles which are fundamental to the decision of this issue.

Clearly, the Michigan Supreme Court erred precisely because it was unable to see past the rhetoric of the State to discern the genuine matter before it, to wit: the liberty right of every competent, adult individual to make fundamental determinations about his or her own bodily tolerance of physical suffering and misery.

III.

THE PROSECUTION TO WHICH THE MICHIGAN SUPREME COURT SUBJECTS THE PETITIONER VIOLATES THE *EX POST FACTO* AND DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

Petitioner contends that by holding that M.C.L. 750.505; M.S.A. 28.773 subjects Petitioner to felony prosecution even though no statute in Michigan holds that assisting suicide is a crime and even though the decisional law of Michigan prior to this case did not hold that M.C.L. 750.505; M.S.A. 28.773 applied to assisting a suicide, Petitioner was denied due process of law and was subject to *ex post facto* treatment.

In Michigan, assisting a suicide was never a crime until February 25, 1993. See *People* v. *Campbell*, 124 Mich.App. 333, 335 N.W.2d 27 (1983). No statute ever defined assisting a suicide as a crime and no court decision ever did so until the decision of the Michigan Supreme Court on December 13, 1994. [*People* v. *Roberts*, 211 Mich. 187; 178 N.W. 690 (1920) did not view assisted suicide as such; rather, it was concluded that one who provided poison to another to commit suicide was guilty of murder.] Thus, the Michigan Supreme Court's decision claims that Petitioner engaged in criminal activity in October, 1991, despite the fact that, at

the time, there was no statutory provision prohibiting assisting a suicide and no decision had ever construed M.C.L. 750.505; M.S.A. 28.773 to prohibit assisting a suicide. Clearly, the Michigan Supreme Court, in engaging in judicial legislation by judicially creating an offense and then ruling that M.C.L. 750.505; M.S.A. 28.773 makes it a felony to commit the newly minted judicial offense. Thus, the Michigan Supreme Court subjected Petitioner to *ex post facto* treatment by criminalizing an act which was not criminal at the time it was performed. Even the Michigan Supreme Court, itself, recognized the repugnant character of its decision by specifically denying, in its opinion, that it was engaging in *ex post facto* action.

Additionally, M.C.L. 750.505; M.S.A. 28.773 is so vague and overbroad, that it is impossible for a citizen to be able to determine whether he or she is in violation of the statute. What acts were indictable at common law and at what point in history? Was performing an abortion within the first trimester indictable at common law? Was a Gypsy's remaining in England for more than thirty (30) days at a time indictable at common law? How is someone to know whether any act is permissible or prohibited if we are at the whim of state judges who may create common law offenses out of whole cloth?

Clearly, the Michigan Supreme Court's foray into judicial legislation as well as its embracing of M.C.L. 750.505; M.S.A.28.773 are constitutionally repugnant.

IV.

THE QUESTION HEREIN IS IMPORTANT.

The question involved herein is an important one, not only to the Petitioner, but to the country as a whole. With insidious diseases such as AIDS, cancer and ALS wreaking havoc on thousands of our citizens, and with

persons living longer and becoming subject to diseases which were known primarily in textbooks, if at all, the citizens of this nation are faced with increasingly serious questions regarding their own destinies.

There are those who may wish to live to the last breath, irrespective of the agony and torture which the cruelties of disease may consign them to suffer. Yet, there are others who may wish not to be victimized in all the horrible manner which some of the most notorious diseases visit upon their casualties. Should an adult, competent individual be forced by the State to endure the torture and suffering of unspeakable diseases against his or her will? May government, under the rubric of "protecting life", subject an unwilling participant to that type of torture which this Court would prohibit being inflicted upon a convicted murderer as being cruel and unusual punishment in violation of the Eighth Amendment?

The position of the State herein is a radical extremist position — an absolute prohibition on a competent adult's ability to obtain assistance of any kind, under any circumstances, for any reason, to end ongoing, insidious and intolerable physical suffering in the face of excruciating disease if the assistance is designed to help that person end his or her own life.

As this nation embarks upon the 21st Century, these questions need to be answered by the highest Court of this land so that the law may be applied fairly and uniformly and so that the victims of catastrophic and tortuous physical infirmity may know that they need not be victimized twice — once by disease and a second time by their own government.

CONCLUSION

It is respectfully requested that this Honorable Court grant this Petition for Certiorari and set this case for full briefing, oral argument and decision.

Respectfully submitted,

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